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Supreme Court, U.S.
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No. 04-142

In The

Supreme Court Of The United States

EVANDRO S. SANTINI, et al.,
Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below correctly entered summary judgment against Petitioners' takings claim, when the property in question was never taken or occupied, physically or legally, and the courts found as a matter of fact that the property retained value to Petitioners throughout the eleven months when a possible future taking was under public consideration?

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiffs/Petitioners: Evandro S. Santini
Alfred Drive
Tolland, CT 06084

Santini Homes, Inc.
1031 Hartford Turnpike
Vernon, CT 06066-4407

Defendant/Respondent: Connecticut Hazardous Waste Management Service
100 Constitution Plaza
Hartford, CT 06103

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CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

On June 10, 1991, the Connecticut Hazardous Waste Management Service ("Service") announced that a parcel of land owned by Evandro S. Santini and Santini Homes, Inc. (hereinafter collectively known as the "Petitioners" or "Santini") was one of the three sites being considered for potential acquisition for a disposal facility for low-level radioactive waste. Eleven months later, the Service completely ended all consideration of the possibility of taking Petitioners' land. Petitioners sued, claiming that the June 10th announcement constituted a temporary taking of their property under Article First, Section 11 of the Connecticut Constitution.

After a trial on the merits, the trial court held, as a matter of law, that the Service had engaged only in planning and preparatory activities which did not constitute a taking. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. CV 94 053 8646S, 1998 WL 422166 at *5 (Conn. Super. July 13, 1998). Furthermore, the trial court found, as a matter of fact, that even if the Service's activities went beyond planning, a taking did not occur because the Petitioners retained use and value in their property. *Id.*[1]

Petitioners sought review in the Connecticut Supreme Court, which upheld the decision of the trial court. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 739 A.2d 680 (1999). Petitioners unsuccessfully sought a writ of certiorari to this Court. 520 U.S. 1225 (2000).

Santini then filed a complaint in federal district court alleging a taking under the Fifth Amendment to the United States Constitution. The Service moved to dismiss on procedural grounds, primarily lack of jurisdiction under the *Rooker-Feldman* doctrine and because the state court decisions barred a second action in federal court under the doctrines of res judicata and collateral estoppel. The Service also moved for summary judgment on the merits because the uncontroverted facts showed that no taking had occurred. The district court granted both of the Service's

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[1] The Petition implies that the land in question retained no value after the announcement. Petition, pp. 3, 4, 9-11, fns. 1, 2, 8, and 9. This claim was rejected by not only the trial court, but also the state supreme court and the Second Circuit, which all agreed that Santini's property retained use and value throughout the time in question. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. at 135, n. 19; *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 131 (2003).

motions. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. 3:01cv563 (D. Conn. Aug. 27, 2002) (Unpublished opinion attached hereto.)

Santini appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, contrary to the district court, that res judicata, collateral estoppel and the *Rooker-Feldman* doctrine did not bar the action. Nevertheless, the court upheld the determination of the district court on the merits that no taking had occurred and that entry of summary judgment for the Service was appropriate. *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130-31 (2003). The Second Circuit subsequently denied a rehearing petition and Santini filed this timely petition for certiorari.

REASONS FOR DENIAL OF THE PETITION

SUMMARY

This petition for a writ of certiorari should be denied because, as every court that has considered this case has concluded, the "fact that Santini's taking claim is based on nothing more than the Service's 1991 announcement – perhaps the prototypical precondemnation governmental activity – dooms the claim on its merits." *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2003), *see also*, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 140, 144, 739 A.2d 680 (1999); *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, No. CV 94 053 8646S, 1998 WL 422166 at *5 (Conn. Super. July 13, 1998). In fact, no taking occurred in this case because the Service's actions never proceeded beyond the planning stage. The Service never acquired the Petitioner's property, never physically occupied the site, never obtained any of the necessary permits to build the facility, and never

completed (in fact barely began) the site characterization necessary to determine if Santini's property, or any of the other potential sites, was even suitable for a disposal facility. Thus, the government never did anything more than begin the study and planning necessary for a project that was quickly abandoned. Further, the state trial court found, as a matter of fact, that Santini's property never lost all use or value. The state supreme court, the federal district court and the Court of Appeals agreed that the property retained value. The factual record is clear that no taking under the Constitution ever occurred.

Furthermore, this case presents no new, novel or unresolved issues regarding takings. This Court has long held that public planning pre-condemnation activity is not, by itself, a taking or acquisition of property. The decision below is fully consistent with this well-established law and it does not conflict with the decision of any other federal courts of appeals.

ARGUMENT

The obvious central flaw in Petitioners' case is that the only government action complained of is the 1991 announcement by the Service that Petitioners' land was one of three sites it was considering for possible future acquisition for a low-level radioactive waste disposal facility. As the courts below, both state and federal, have found:

> Even if Santini's property had been designated the preferred site, it still would have had to clear a number of regulatory hurdles before becoming the location of the waste disposal facility. For example, permits from the NRC, the Connecticut Department of Environmental Protection,

> and the Connecticut siting council, as well as eminent domain proceedings, *see* Conn. Gen. Stat. §22a-163w(b)(c)(1995), would have been required.

Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 122 & n. 3 (2003), *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 251 Conn. 121, 125-26 & n. 6, 739 A.2d 680 (1999); *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 1998 WL 422166 (Conn. Super. 1998).

Ultimately, no site was chosen and none of the necessary state or federal permits was ever obtained. The Service not only never took the Petitioners' property, it never went beyond the planning or pre-condemnation phase of its project before, in less that a year, it abandoned the entire project.

This Court has explicitly determined that governmental planning activities of this nature do not constitute takings. The Second Circuit quoted directly from this Court's controlling decisions as follows:

> "Appellants also claim that the city's pre-condemnation activities constitute a taking. The State Supreme court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the

> process of governmental decision making, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense."
>
> *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980) (citations and internal quotations marks omitted); see also *Danforth v. United States*, 308 U.S. 271, 285 (1939) (stating that "[a] reduction or increase in the value of property ... by reason of legislation for or the beginning or completion of a project" does not constitute a taking). The Supreme Court later cited *Agins* and *Danforth* with approval for the proposition that "depreciation in value of [] property by reason of preliminary activity is not chargeable to the government." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987).

Santini, 342 F.3d at 130-131. The Second Circuit continued:

> There is no doubt that the siting announcement constitutes "preliminary activity" as that term is used in *First English*, as the announcement was but one step of many that the state had to pursue before it could condemn Santini's property. The Service never conducted the requisite on-site examination of Santini's property, never selected it as the preferred site, did not monitor it for twelve months as required by NRC regulations, and did not obtain the necessary permits from the NRC, the Connecticut Department of Environmental

> Protection, and the Connecticut siting council.

Id. at 131.

Based on these facts, the district court and the Court of Appeals found that the Service was merely engaged in necessary planning and study preparatory to a potential acquisition of property that never occurred and that, under the controlling precedents of *Agins* and *First English*, no taking occurred.

Finally, the Second Circuit acknowledged the Petitioners' apparent claim that *Agins*, *Danforth*, and *First English* somehow do not control this case, and that the analysis under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978) is required. The court accurately noted that *Lucas* requires a showing that the siting consideration announcement deprived Santini of <u>all</u> economically viable use of his property and that Santini had not, as a matter of fact, made that showing as the properties "did have use and value after the notice." *Santini, supra.* at 131. The Court of Appeals also properly rejected the *Penn Central* argument as the government's action here, a mere announcement of consideration for possible future acquisition, was obviously not of the character which could constitute a taking. *Id.* at 132.

CONCLUSION

This case involves a routine application of controlling precedent to facts which the four courts below have all agreed upon. The Second Circuit correctly determined that the Service's announcement that it was considering three sites for suitability for potential future condemnation, an action the court called "perhaps the prototypical pre-condemnation governmental activity," did not constitute a taking.

Respectfully submitted,

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[Filed Aug 27 2002]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:01cv563 (WWE)

EVANDRO S. SANTII and
SANTINI HOMES, INC.,

Plaintiffs,

v.

CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE,

Defendant.

RULING ON MOTION TO DISMISS AND
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case concerns an alleged taking of property by Connecticut Hazardous Waste Management Service in violation of the Fifth Amendment of the United States Constitution. The plaintiffs, Evandro Santini and Santini Homes, have previously litigated their Connecticut State Constitutional claim to the Connecticut Superior Court and the Connecticut Supreme Court. In that action, the Connecticut Supreme Court affirmed the Superior Court's holding that no constitutional taking had occurred. Santini v Connecticut Hazardous Waste Management Service, 251 Conn. 121 (1999).

The defendant has filed a motion to dismiss. The parties have also filed cross-motions for summary judgment. After consideration of the pending motions, defendant's motion to dismiss will be granted on the basis of the doctrine of federal jurisdiction formulated in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (the "Rooker-Feldman doctrine"). In the alternative, even if federal jurisdiction does exist, defendant's motion for summary judgment will be granted on the basis of collateral estoppel and on the merits of the claim.

BACKGROUND

The parties have submitted affidavits, exhibits and Local Rule 9 statements of facts, which reveal the following undisputed facts. These undisputed facts are also reflected in Santini v Connecticut Hazardous Waste Management Service, 251 Conn. 121 (1999).

Evandro Santini is a developer of residential homes, and Santini Homes is the corporation used by Mr. Santini to develop real estate properties. Connecticut Hazardous Waste Management Service ("Service") is a quasi-public governmental agency established pursuant to Connecticut General Statutes Section 22a-163, et seq., with the responsibility to site a facility for the disposal of low-level radioactive waste.

In 1985, the plaintiffs acquired land in Ellington, Connecticut, and obtained approval for a 16-lot subdivision to be known as Ellridge Estates. The plaintiffs' goal was to create up to 100 homes. In support of this goal, the plaintiff installed road, sewer and drainage improvements.

In March, 1988, Santini purchased an adjoining 54-acre parcel that has substantial frontage on a town road called Pinney Street.

In 1987, after conducting due diligence and market research, the plaintiffs began construction of model homes in Ellridge Estates. From 1989 through the spring of 1991, construction of Ellridge Estates proceeded slowly due to the growing regional real estate recession. As of June, 1991, plaintiffs had, inter alia, subdivision approval for 16 homes; and an equity investment in 75 acres, subdivision improvements, four constructed model homes of more than $5 million; a vested property right under state law to proceed with residential construction; and as-of-right zoning for the balance of the development plan for the 54 acres.

On June 10, 1991, the Service announced that a site, which included the plaintiffs' property, was one of three sites under consideration for a low-level radioactive waste disposal facility. Any one of these three sites could have become a "preferred site" to become the location for the disposal facility. On June 30, 1991, the plaintiffs' property was depicted on the front page of The Hartford Courant alongside the international symbol for radioactivity.

No site was actually ever selected as the preferred site. After selection of a preferred site, additional administrative requirements would have had to take place. Certain permits from the federal Nuclear Regulatory Commission, the state department of environmental protection, and the Connecticut siting council would have been required. Any proposed facility would also have been subject to regulations and restrictions imposed by "any town, city or borough," which would have been subject to

review by the siting council. See Conn. Gen. Stat. Section 22a-163n(b). Finally, if these requirements had been satisfied, eminent domain proceedings would have to proceed, and the property owner would have to be compensated. Conn. Gen. Stat. § 22a-163w(b) and (c).

In January, 1992, the governor's office proposed legislation to rescind the statutory acquisition of a public facility for the disposal of low-level radioactive waste in Connecticut. On May 5, 1992, the legislature repealed the siting announcement.

DISCUSSION

A. Standard of Review

Motion to Dismiss

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept as true the well pleaded allegations of the complaint. Albright v. Oliver, 510 U.S. 266, 268 (1994). In addition, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A motion to dismiss under FRCP 12(b)(1) "challenges the court's statutory or constitutional power to adjudicate the case before it." 2A James W. Moore et. al.,

Moore's Federal Practice, P 12.07, at 12-49 (2d ed. 1994). Once the question of jurisdiction is raised, the burden of establishing subject matter jurisdiction rests on the party asserting such jurisdiction. Thomson v. Gaskill, 315 U.S. 442, 446 (1942).

Motion Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. American International Group Inc. v. London American International Corp., 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. Celotex Corp., 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. Anderson, 477 U.S. at 249.

B. Analysis

Rooker-Feldman Doctrine

In its motion to dismiss, defendant argues that the Rooker-Feldman doctrine deprives this Court of federal jurisdiction. Rooker-Feldman is an abstention doctrine premised on the proper scope of federal jurisdiction. The doctrine provides that the lower federal courts lack subject matter jurisdiction over a case if the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment. Hachamovitch v. DeBuono, 159 F.3d 687, 693 (2d Cir. 1998).

In Rooker, 263 U.S. 413, the U.S. Supreme Court held that federal district courts lack jurisdiction to review state court decisions, even if those decisions are erroneous. In Feldman, 460 U.S. 462, the Court held that a United States District Court has no authority to review final judgments of a state court in judicial proceedings, which included judgments on claims that were "inextricably intertwined" with the state court's determinations.

The Second Circuit has interpreted the Supreme Court's use of "inextricably intertwined" to mean that "where a plaintiff had an opportunity to litigate a claim in a state proceeding (as either a plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of preclusion." Moccio v. New York State Office of Court Admin., 95 F.3d 195 (2d Cir. 1996). Thus this court must decide whether the Rooker-Feldman doctrine applies to plaintiffs' claims by turning to the arguments made in defendant's motion for summary

judgment that plaintiffs' claim is barred by the doctrines of res judicata and collateral estoppel.

Federal courts are required to give a prior state court decision the same preclusive effect under either res judicata or collateral estoppel that courts of that state would give to that decision. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982). State law determines whether a prior state-court proceeding has any preclusive effect in a subsequent action pending in federal court. See Fayer v. Middlebury, 258 F.3d 117, 124 (2d Cir. 2001).

To establish that a claim is barred by the doctrine of res judicata and obtain summary judgment, a party must establish that there are no genuine issues of material fact in relation to each of the following elements: (1) the identity of the parties is the same as in the prior action (or privity is sufficiently established); (2) the same claim, demand or cause of action is at issue; (3) the judgment in the prior action was rendered on the merits by a court of competent jurisdiction; and (4) the parties had the opportunity to fully and fairly litigate the matter. See Tirozzi v. Shelby Ins. Co., 50 Conn. App. 680, 686-87, *cert. denied*, 247 Conn. 945 (1998).

Under the doctrine of collateral estoppel, the judgment of prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). A party raising a defense of collateral estoppel must demonstrate that an issue that is presented in the second case was fully and fairly litigated. Jackson v. R.G. Whipple. Inc., 225 Conn. 705 714-15 (1993). The issue must have been necessary to the judgment in the first case. Gladysz v. Planning & Zoning Comm'n, 256 Conn. 249,

261 (2001). If an issue has been determined, but the judgment is not dependent upon determination of the issue, the parties may relitigate the issue in a subsequent action. Delahunty v. Massachusetts Mutual Life Insurance Company, 236 Conn. 582 (1996).

In this instance, plaintiffs filed the first lawsuit to comply with an interpretation of a ripeness requirement for a takings claim as articulated in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 195 (1985). Specifically, plaintiffs cite language from Williamson, in which the Supreme Court stated that if "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." Plaintiffs assert that Williamson County means that a property owner cannot bring a federal claim until he has litigated his takings claim in the state court using state procedures and has been denied just compensation.

At present, federal law demarcates no clear approach to determine the preclusive effect of a previous state court action instituted by a property owner in order to satisfy the ripeness requirement of Williamson County. In Wilkinson v. Pitkin County Board of Comm'rs., 142 F.3d 1319 (10th Cir. 1998), a federal takings claim was barred from litigation in federal court where the Fifth Amendment claim was actually raised and litigated during the state court proceedings. In Fields v. Sarasota Manatee Airport Authority, 953 F. 2d 1299, 1304 (11th Cir. 1992), the Eleventh Circuit held that since the federal claim could have been raised in state court, the federal claim had been extinguished by the state proceeding. The Ninth Circuit, however, has indicated that the relevant inquiry is whether

the state decision on the state constitutional claim represented an equivalent determination for the federal takings claim, so as to invoke the doctrine of issue preclusion. Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995). Similarly, in Treister v. City of Miami, 893 F. Supp. 1057, 1067-68 (S. D. Fla. 1992), affirmed, 56. F.3d 1389 (11th Cir. 1995), a state court's decision that was sufficiently parallel to the federal adjudication had preclusive effect on a subsequent federal takings action in federal court.

In this instance, the Court considers the appropriate inquiry to be whether the state decision on plaintiffs' Connecticut constitutional claim represents an equivalent determination of a federal Fifth Amendment claim. In making this determination, the Court reviews whether the Takings Clause of the Fifth Amendment requires a broader inquiry than the claim pursuant to the Connecticut Constitution. See Dodd v. Hood River County, 136 F. 3d 1219, 1224 (9th Cir. 1998). If so, then the Fifth Amendment claim was not fully and fairly adjudicated, and the issues relevant to Fifth Amendment takings analysis were not necessary to determine the state court decision.

On appeal to the Connecticut Supreme Court, the plaintiffs argued that the trial court improperly concluded that (1) the designation of the plaintiffs' properties among the three finalists for acquisition and development as a disposal facility for low-level radioactive waste was not a practical confiscation and not an inverse condemnation under the state constitution; (2) the defendant's conduct did not amount to an inverse condemnation under the alternative balancing test; and (3) mere governmental planning does not constitute a taking, in the constitutional sense. The Connecticut Supreme Court affirmed that

governmental planning does not, as a matter of law, constitute a taking under article first, § 11, of the state constitution, and that defendant's conduct constituted planning. Because defendant's planning did not constitute a taking, the Court held that it was not necessary to discuss the plaintiffs' factual claims of loss of economic use.

Further, in reaching its conclusion, the Connecticut Supreme Court stated that it had restricted itself to the claim concerning the Connecticut Constitution. However, in what appears a response to plaintiff s argument that the Connecticut Constitution does not provide less protection for individual rights than that furnished by the Fifth Amendment, the Court noted that:

> None of the parties argues that our state constitution provides different protection for property owners from that afforded by the federal constitution. Furthermore, we are not aware of any doctrine, cases or reason that would compel, in the context of this case, the treatment of the plaintiffs' state constitutional claims different than the treatment those claims would have been given had we been adjudicating the plaintiffs' claims under the federal constitutional takings jurisprudence. We, therefore, assume for the purposes of this appeal that article first, § 11, of our state constitution affords the same protection as that provided under its federal counterpart.

Santini, 251 Conn. at 136 n.20.

The Connecticut Supreme Court went on to reject the plaintiffs' contention that existing Connecticut precedent, namely Textron. Inc. v. Wood, 167 Conn. 334, 350 (1974) which holds that governmental planning does not constitute a taking, cannot survive current federal jurisprudence. In Textron, the Connecticut Supreme Court held that a substantial interference involving the invasion of some specific legal interest in the property required a "definitive indication that the state's intent to condemn the property in question has become fixed and irreversible." 167 Conn. at 348. The Court explained the two reasons for requiring a definitive, fixed and irreversible intention as (1) once the state has reached a final decision; no one can interfere with the sovereign's right to properly exercise its power of eminent domain, and (2) without such a requirement, both the state and property owner would be deprived of the capacity to reasonably gauge their respective rights and effectively plan their future activities.

In consideration of Santini, the Connecticut Supreme Court reconciled the holding of Textron with existing federal jurisprudence as represented in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 321 (1987). The court noted that First English states that "depreciation in the value of property" by reason of preliminary government action, which is consistent with the holding that government planning cannot constitute a taking.

This Court agrees with the state Supreme Court that its holding is consistent with federal jurisprudence relevant to Fifth Amendment takings analysis. Plaintiffs' claim would not be afforded a broader standard than that articulated by the Connecticut Supreme Court.

It is well established that a "final decision" must be rendered by the government agency prior to the institution of a Fifth Amendment takings claim. Williamson County, 473 U.S. at 186. Williamson County instructs that a final decision is necessary because the inquiry into economic impact of the challenged action cannot be evaluated until the state has "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Similarly, the Second Circuit has elaborated that, without a final decision, a court cannot determine adequately the economic loss occasioned by the government action. Southview Associates, LTD. v. Bongartz, 980 F. 2d 84 (1992). A plaintiff may not satisfy the final decision requirement where the possibility exists that some use exists that would enable the plaintiff to derive economic benefit from the property. See MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352 (1986).

This Court finds the Connecticut Supreme Court's standard as to whether government action constitutes a "fixed and irreversible intention" to be an analogue to federal law requiring a "final decision."[2] Both standards have the purpose of enabling the court to assess the rights of the parties relevant to the challenged action. For purposes of collateral estoppel, the issue necessary to the Connecticut Supreme Court's decision – the extent or

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[2] The Court notes that the Connecticut Supreme Court even uses "final decision" interchangeably with "fixed and irreversible intention." *See Santini*, 251 Conn. at 142.

finality of the defendant's action – is identical to consideration required for the instant federal takings claim.

In its analysis of defendant's conduct, the Connecticut Supreme Court reviewed the facts that the defendants had yet to select a property as the "ultimate disposal site"; that further study "was necessary before any final such choice was to be made"; and that there remained several administrative requirements to be met in order for "the preferred site finally to be selected for construction of the disposal facility." The Court noted further that no witness who testified regarded the plaintiffs' property as the final site for the disposal facility. Analysis of these identical facts would have been required to determine whether defendant's conduct constituted a final decision relevant to the federal takings claim. Accordingly, the Court finds that the federal takings claim is inextricably intertwined with the Connecticut Supreme Courts judgment, and therefore barred under the Rooker-Feldman doctrine[3].

The Court is unpersuaded by plaintiffs' argument that either collateral estoppel or Rooker-Feldman is inapplicable in light of the state court's failure to consider the tests set forth in Lucas v. South Carolina Coastal

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[3] Plaintiffs argue that the *Rooker-Feldman* doctrine should not apply in light of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), wherein the Supreme Court held that a litigant who commenced a federal claim in federal court but was relegated to state court could file with a federal court a reservation of intent to pursue the federal claim later. However, plaintiff has not persuaded this Court that such a reservation is applicable to the instant case.

Council, 505 U.S. 1003, 1019 (1992) and Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). As discussed previously, the Court must find that defendants' conduct constituted a final decision prior to measuring the economic impact of the defendant's action as required by Lucas and Penn Central. Accordingly, this Court will grant the defendant's motion to dismiss on the basis of the Rooker-Feldman doctrine. In the event that Rooker-Feldman does not bar this claim, summary judgment is appropriate on the basis of collateral estoppel.

Finally, even if collateral estoppel and Rooker-Feldman do not apply, summary judgment in defendant's favor is appropriate due to the lack of a final decision as required by Williamson County. The defendant's selection of plaintiffs' property as one of three sites proposed for radioactive disposal left open the possibility that plaintiffs' property would not ultimately be selected as the radioactive disposal site.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss [document #18] is GRANTED; the defendant's for summary [document #20] is GRANTED; and plaintiffs' motion for summary judgment [document #23] is DENIED. The clerk is instructed to enter judgment in favor of the defendant and to close this case.

SO ORDERED.

/s/ Warren W. Eginton
Warren W. Eginton, Senior U.S. District Judge

Dated at Bridgeport, Connecticut this 27th day of August, 2002.